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RIGHTS OF THE CRIMINALLY ACCUSED UNDER INTERNATIONAL LAW

A Comparison Between the NATO Status of Forces Agreement and Traditional International Law

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RIGHTS OF THE CRIMINALLY ACCUSED UNDER INTERNATIONAL LAW

A Comparison Between the NATO Status of Forces Agreement and Traditional International Law

By Captain Jennifer R. Rider, USAF[1]

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[1] The opinions and conclusions expressed herein are those of the author and do not necessarily represent the view of the United States Air Force or any other governmental agency.

I. INTRODUCTION

With the sudden collapse of the former Soviet Union, yesterday's bi-polar world of military superpowers is quickly fading into history. Today's new world order is moving towards a multi-polar world of economic superpowers with increased cooperation and interdependence in a myriad of areas. This progress towards global cooperation together with a growing international emphasis on individual rights indicate a need for the international community to set baselines for fundamental human rights in many areas. One of these areas is criminal law. When an individual travels to a foreign country and runs afoul of the law, should he be entitled to a certain manner of treatment in accord with his status as a human being? Which country can exercise jurisdiction over the individual? If the individual is tried in a foreign court, what can be done to ensure he receives a fair trial?

This paper will address these issues and suggest there is a lack of guidance in the international criminal law arena regarding the basic rights of the criminally accused. This gap needs to be addressed on the international level in order to provide basic rights to the accused regardless of what country he might find himself in. To illustrate the problem, this paper will focus on the ability of the United States to extend protection to its nationals abroad. This will consist of a comparison between the protections provided to United States military members in foreign countries under the North Atlantic Treaty Organization Status of Forces Agreement and those provided to the "everyday United States citizen" under traditional international law. It will show that under traditional international law principles, the accused is entitled only to the rights existing under local law, which sometimes may be very limited, and there is little his native country can do to assist him. On the opposite side

of the spectrum are the Status of Forces Agreements which provide a list of basic rights to an accused. Although these agreements have shortcomings, as will be discussed in the paper, they provide an excellent starting place for the ultimate solution to the problem, an "International Procedural Bill of Rights".

As a background for this discussion, this article begins with a brief explanation of basic international law principles of jurisdiction over criminal offenses. It will then move to a discussion of the NATO Status of Forces Agreement, including its provisions as well as its shortfalls, and the status of United States nationals subject to traditional international law. The paper concludes by briefly discussing the feasibility of an international codification of basic individual rights, using the Status of Forces Agreements as a model.

II. THE BASIC PRINCIPLES OF INTERNATIONAL JURISDICTION OVER CRIMINAL OFFENSES

Jurisdiction is the cornerstone upon which rests the ability of a country to extend procedural safeguards to its nationals in other countries. For example, if the United States obtains jurisdiction over a U.S. national, the accused is tried in a United States court with all constitutional rights afforded to an accused in the United States. The difficulties occur only when the U.S. national is subject to the jurisdiction of a foreign court.

There are two primary views of jurisdiction in international law, both of which stem from the concept of state sovereignty. The first theory is territorial sovereignty. According to this concept, the "jurisdiction of a nation within its own territory is necessarily exclusive and absolute."[2] This necessarily indicates an absolute right of the sovereign to determine

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[2]The Schooner Exchange v. M'Faddon, 111 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812). The case involved a suit by two American citizens claiming ownership of a vessel which was seized by France in 1810. The Supreme Court (continued...)

and adjudicate law within the state and the exclusion of other states from doing so.[3] The competing view of jurisdiction is termed nationality jurisdiction. This theory asserts that a nation has jurisdiction over all acts of its nationals without regard to the locus of the crime. Nationality jurisdiction however, is qualified by the rule that no state may enforce its laws within the territory of another state absent specific consent.[4] These competing views of jurisdiction lead to a situation where concurrent jurisdiction over the offense exists and confrontation as to who may prosecute the offender is likely.

Due to international respect for territorial sovereignty, the presumption is, when a national of one state enters the territory of another state, that national is subject to the laws of the host state. This general presumption can be overcome by specific agreement or consent of the host state.[5] The state may opt to waive its jurisdiction over the defendant in a particular case or enter into treaties surrendering portions of its territorial jurisdiction in specific circumstances. An example of such an agreement is the NATO Status of Forces Agreement,[6] governing the division of criminal jurisdiction over visiting military forces. The following two sections address the safeguards provided to U.S. nationals under the

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[2](...continued)
dismissed the claim and while asserting territorial sovereignty as the primary theory of obtaining jurisdiction, stated that the law of the flag governs this case since a sovereign is "understood to waive the exercise of a part of that ...jurisdiction ... where he allows troops of a foreign prince to pass through..."

[3]Beesley, The Law of the Flag, The Law of Extradition, The NATO Status of Forces Agreement, and their Application to Members of the United States Army National Guard, 15 Vand. J. Transnat'l L. 179, 184 (1982).

[4]Wilson v. Girard, 354 U.S. 524, 529 (1957) (citing The Schooner Exchange v. McFadden, supra note 2.)

[5]Armstead, Crossroads: Jurisdictional Problems for Armed Service Members Overseas, Present and Future, 12 S.U. L.Rev. 1 (1985).

[6]The North Atlantic Treaty Organization, Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846 (hereinafter cited as NATO SOFA).

Status of Forces Agreement and those provided to the "everyday" citizen who is subject to the traditional presumption of territorial sovereignty.

III. PROCEDURAL SAFEGUARDS OF CRIMINAL DEFENDANTS UNDER THE NATO STATUS OF FORCES AGREEMENT

A. Basis of Criminal Jurisdiction Under the NATO SOFA

Jurisdiction over military forces has traditionally fallen into a category outside the general presumption of territorial sovereignty. Initially, although territorial sovereignty was the prevailing theory of jurisdiction, foreign countries allowing passage of visiting military forces were presumed to have waived jurisdiction over the force in favor of the sending state.[7] After World War II, due to a need the United States felt to station military forces abroad during peacetime, this presumption changed to the modern view which subjects military members to the law of the foreign country.[8] There naturally arose conflict between the sending and receiving states over which country could assert jurisdiction over these forces.[9] The United States desired to exercise jurisdiction over its own forces and the foreign nation desired maximum jurisdiction over offenses committed within its territory.[10] The resulting compromise of shared jurisdiction was codified in international legislation - the NATO SOFA and various other agreements with nations such as Korea[11], Japan[12], and

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[7] Schooner Exchange, supra note 2.

[8] Armstead, supra note 5, at 1.

[9] For the purposes of this paper, the United States is presumed to be the sending state. The receiving state is designated as the foreign nation where U.S. troops are located.

[10] Note, Jurisdiction Over Forces Abroad, 70 Harv. L.Rev 1043 (1957).

[11] Agreement on Jurisdiction over Offenses by United States Forces in Korea, July 12, 1950, United States-Korea, 5 U.S.T. 1408, T.I.A.S. No. 3012 (hereafter Korean Protocol).

Germany[13]. In a 1957 case[14], the United States Supreme Court affirmed this change in presumption stating that, absent specific agreement or other international law, United States military in foreign countries are subject to the law of that country.[15] This is the current law today. The Status of Forces Agreements exist as exceptions to the general rule and as evidence of the foreign nation's consent to surrender its jurisdiction over criminal offenses committed by U.S. nationals in specific circumstances.

Article VII of the NATO SOFA sets forth the compromise reached over the jurisdictional question. The sovereigns did not give up their criminal jurisdiction over visiting military forces but did agree to share it with the sending state,[16] thus establishing a system of exclusive and concurrent jurisdiction. If the act violates only the law of one state then that state has exclusive jurisdiction over the offense.[17] For example, if the offense is punishable under the Uniform Code of Military Justice, but such offense does not exist under foreign law, the United States retains exclusive jurisdiction over the accused. In all other cases, the jurisdiction is considered to be concurrent with the sending state having primary

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[12](...continued)

[12]Agreement on Article III of the Security Treaty, Feb 28, 1952, United States-Japan, 3 U.S.T. 3341, T.I.A.S. No 2492 (hereafter Japanese Protocol).

[13]Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces With Respect to Foreign Forces Stationed in the Federal Republic of Germany, Aug. 3, 1959, 1 U.S.T. 531, T.I.A.S. No. 5351 (hereafter Supplementary Agreement).

[14]Wilson v. Girard, supra note 4. This case involved an American military member charged with the death of a Japanese woman. The United States was deemed to have primary jurisdiction under the Japanese agreement but opted to waive jurisdiction.

[15]Baldwin, "The International Law of the Armed Forces Abroad," Lecture to the Naval War College, Naval War College Review 6 (Nov. 1965).

[16]Davis, Waiver and Recall of Primary Concurrent Jurisdiction in Germany, Army Law. 30 (May 1988).

[17]NATO SOFA, supra note 6, Art. VII. para. 2.

jurisdiction in two situations: if the offense is "solely against the property or security" of the sending state or the offense is "solely against the person or property of another member of the force, civilian component, or dependent" of the sending state.[18] In all other cases the receiving state has the primary right to exercise jurisdiction[19]

An important qualification of the right to exercise primary jurisdiction is the waiver policy set forth in Article VII, paragraph 3(c) of the SOFA. The state with primary jurisdiction is expected to give "sympathetic consideration" to a request by the other state for a waiver of jurisdiction when the exercise of jurisdiction is of "particular importance" to the other state.[20] The important issue, treatment of the U.S. national under the foreign judicial system, arises when the United States either fails to obtain a waiver of the receiving state's primary jurisdiction or actually grants a waiver of U.S. primary jurisdiction. When this occurs, the U.S. national is not guaranteed the protections he might usually expect.

B. Constitutional Protections Under the NATO SOFA

(1) NATO SOFA Article VII: When a U.S. national subject to the NATO SOFA[21] is prosecuted in a foreign court, Article VII, paragraph 9 of the SOFA ensures the following

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[18]Id. para. 3(a).

[19]Id. para. 3(b).

[20]In the majority of agreements a waiver request is to be given sympathetic consideration however, under the German agreement waiver is considered automatic and is only recalled in situations where jurisdiction is imperative the a major interest of Germany. Also in the agreement with Japan, waiver is assumed to be granted unless Japan responds to the contrary within 20 days of the request. Supplementary Agreement, supra note 13.; Japanese Protocol, supra note 12.; See generally Rouse, The Exercise of Criminal Jurisdiction Under The NATO Status of Forces Agreement, 51 Am. J. Int'l Law 29 (1957).

[21]Persons subject to the SOFA are considered to include military members stationed overseas, members of the civilian component attached to the military forces, and dependants accompanying the military forces. The application of the SOFA to these sets of individuals has been substantially limited. See section III(B): Evaluating the SOFA guarantees, infra.

procedural guarantees for the individual:

> 1. To a prompt and speedy trial;
>
> 2. To be informed, in advance of trial, of the specific charge or charges made against him;
>
> 3. To be confronted with the witnesses against him;
>
> 4. To have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of the receiving State;
>
> 5. To have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;
>
> 6. If he considers it necessary, to have the services of a competent interpreter; and
>
> 7. To communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial.[22]

Paragraph 8 also provides double jeopardy protection. The U.S. national is not only entitled to these guarantees but also to all rights normally provided under local law.[23]

(2) The Senate Resolution: Constitutional protection of criminal defendants in the United States is a paramount concern which naturally extends to U.S. forces stationed in foreign countries. In line with this concern, the Senate adopted a resolution expressing reservations to the NATO SOFA.[24] The second of these reservations, exemplifies the U.S. policy to maximize jurisdiction over U.S. forces. It directs the Commanding Officer of the

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[22]NATO SOFA, supra note 6, Art. VII. sec 9.

[23]Romero, An Administrative Model of Juvenile Justice: The NATO Status of Forces Agreement Application to American Juvenile Offenders in Germany, at 11 (1975).

[24]The text of the resolution is reprinted in 4 U.S. Treaties & Other Int'l Agreements 1828-29; These reservations were implemented by the Department of Defense in DOD Directive 5525.1, Status of Forces Policies and Information, 7 August 1979.

United States armed forces in the foreign state to conduct a "country study" when a U.S. national is accused of a crime by a foreign state. The study compares the rights of the accused under the law of the foreign country to those the accused would receive under the United States Constitution and to the procedural safeguards contained in the European Human Rights Convention.[25] As set forth in the DOD Directive implementing the Senate Resolution, to be considered "fair" a foreign trial must provide safeguards similar to those required by the fourteenth amendment in state courts.[26] If the country study indicates a danger that the accused will not receive a fair trial, the Third Reservation in the Senate Resolution directs the Commander to request a waiver of jurisdiction. Although the Senate Resolution indicates a policy to request a waiver only when there is danger of an unfair trial, it is United States policy to obtain a waiver in virtually all cases where the foreign country has the primary right of jurisdiction.[27] This policy has generally been successful.[28]

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[25]European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

[26]DOD Directive supra note 24, (Encl 2) encompasses 17 requirements including:

1. Criminal statute must set forth definite standards of guilt.
2. No prosecution under ex post facto laws.
3. Accused must be informed of nature of accusation and have reasonable time to prepare a defense.
4. Assistance of counsel.
5. Right to be confronted with hostile witnesses
6. Use of compulsory process
7. Prohibition of evidence obtained through unreasonable search and seizure
8. Right against self-incrimination
9. No cruel and unusual punishment
10. Speedy and public trial
11. Double jeopardy prohibition

[27]Rouse, supra note 20 at 47.; see S.Rep. No. 2558, 84th Cong., 2d Sess. (1956); see SOFA Waiver Policy, DOD/GC, 5 February 1973.

[28]Renner, International Law and Criminal Jurisdiction Over Visiting Armed Forces: Reconciling the Concurrent Jurisdiction Discontinuity, 14 Cal. W. Int'l L.J. 351, 375 (Spring 1984).

To ensure compliance with the Article VII, paragraph 9 guarantees, the Fourth Reservation requires that a representative of the United States attend the trial of U.S. nationals subject to the SOFA and report any failure to comply with Article VII, paragraph 9.[29] DOD Directive 5525.1 sets out specific requirements as to who the observer shall be and what the report shall contain.[30]

Additionally, although NATO SOFA Article VII, Section 9(e) provides for free counsel, it is "under the conditions prevailing ... in the receiving State." To negate any possible deficiencies in the SOFA counsel provision, Congress passed Public Law 777.[31] This statute allows the Secretary of the military branch involved to "employ counsel, pay counsel fees, court costs, bail and other expenses incident to the representation..."[32] Together with the provisions of the SOFA, these congressional acts and DOD directives seek to afford basic Constitutional protections to U.S. forces abroad.

C. Evaluating the SOFA Guarantees

By negotiating SOFAs, the United States has made an effort to afford some protection to its military forces, civilian component, and dependants who are stationed overseas and charged with criminal offenses. In general, the effort has been quite effective, but is it as effective as it was intended to be? Do the enumerated guarantees along with the supplemental directives and public law truly provide adequate protection against an unfair

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[29]Id. at 367.

[30]DOD Directive, supra note 24.

[31]Snee & Pye, Status of Forces Agreement: Criminal Jurisdiction 112 (1957).

[32]70 Stat. 630.; Also 10 U.S.C. 1037.

trial in a foreign tribunal? The following five sections will address some of the shortcomings of these agreements. These shortcomings include a failure to bring all desired individuals under U.S. jurisdiction, difficulties with the constitutionality and the application of the waiver provisions, the illusory restriction on double jeopardy, the interpretation of the procedural protections, and a lack of enforcement mechanisms.

(1) **Jurisdictional Gaps**: The threshold problems concern the jurisdictional provisions in Article VII as they relate to military members, members of the civilian component, and military dependants. On their face these provisions seem able to encompass all three categories of individuals. In fact, they merely succeed in providing the U.S. jurisdiction over the military member. In addressing this issue, it is crucial to take notice of the specific language contained in Article VII of the treaty.[33] To be amenable to U.S. jurisdiction the individual must be subject to military law whereas the provisions granting jurisdiction to the receiving state specifically list military forces, civilians and dependants.

Obviously military force members are subject to military law and thus fall under the exclusive jurisdiction of the United States when the member's act violates only United States law, more specifically the Uniform Code of Military Justice (UCMJ).[34] Few offenses by

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[33]Article VII, paragraph 1(a) recognizes the right of the United States to exercise jurisdiction over "all persons subject to the military law of that State" while section 1(b) recognizes the fact that the receiving state has jurisdiction over "members of a force or civilian component and their dependants." In granting exclusive jurisdiction to the sending State, paragraph 2(a) states that the military authorities "shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that state" whereas section 2(b) specifically grants exclusive jurisdiction to the receiving state over "members of a force or civilian component and their dependents." The right of the sending State to exercise primary jurisdiction described in section 3(a) applies to "a member of a force or of a civilian component in relation to..." offenses against the property of the United States, offenses against the person or property of a U.S. national, or offenses "arising out of any act or omission done in the performance of an official duty." All other offenses fall under the primary jurisdiction of the receiving State.

[34]Force is defined as the personnel belonging to the land, sea or air armed services of one Contracting Party when in the territory of another Contracting party ... in connection with their official duties ..." NATO SOFA, supra note 6, Article I, paragraph 1(a).

military members fall inside the exclusive jurisdiction of the receiving state since the majority of offenses fit within Article 134 of the UCMJ.[35] However, if a narrow reading of Article 134 is proposed, many offenses may violate only the law of the receiving state. It is unlikely that the drafters intended such a broad application of the receiving state's exclusive jurisdiction to U.S. forces.[36]

When jurisdiction is concurrent, offenses by the military member usually fall within the primary jurisdiction of the United States. But, when the act is not solely against person or property of the United States and it is questionable whether the act was *in the performance of an official duty*, the receiving state may exercise primary jurisdiction. Who determines what constitutes official duty? This is not as broad a category as it might seem. The fact that the military member was on duty when the commission occurred is insufficient alone to constitute official duty. This narrow definition makes the range of offenses falling outside U.S. primary jurisdiction fairly expansive.[37] Disputes have been avoided on the issue by the receiving state generally accepting the sending state's official duty determination.[38] In general, although not as airtight as was intended, the SOFA enables the United States to obtain jurisdiction over military members in the majority of circumstances.

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[35]An act is chargeable under Article 134 of the UCMJ if the act brings discredit on the armed forces. See Rouse, supra note 20, at 38.

[36]Snee & Pye, supra note 31, at 32.

[37] For example, if an airman has an accident while driving a government vehicle on an errand required by his duties the accident would arise out of the performance of official duties but if the same airman makes a stop on the run to break into a store, the robbery does not fall into this category. Baker, Forces Abroad, Defense/82, July 1982, pp. 20-25, at 23.

[38]The Supplementary Agreement erases this confusion by specifying that the duty determination is to be made according to the laws of the sending state. Renner, supra note 28, at 371.

Civilians stationed with U.S. forces and dependants of U.S. forces encounter more difficulty in this area. Although UCMJ, Article 2(II) provides that "all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States" are subject to the UCMJ, the United States Supreme Court held in Reid v. Covert that application of the UCMJ to these individuals during peacetime is a constitutional violation.[39] This decision effectively removes civilians and dependants from the exclusive jurisdiction of the United States.

Looking at the UCMJ provision for jurisdiction over the civilian component,[40] the scheme of Article VII, and the involuntary nature of the civilian's presence in the foreign country, it seems clear that the civilian component was intended to be treated in the same manner as military members.[41] The civilian component is also specifically listed in Art. VII, Sec. 3(a) as subject to the primary jurisdiction of the United States. In spite of this provision, the clause was negated by the Supreme Court ruling in Reid since jurisdictional authority is exercised by the military. The overall effect is to subject the civilian component to the exclusive jurisdiction of the receiving state in all situations where the act violates local law. This creates a jurisdictional gap that occurs when either the offense is not a violation of a local law or the local authorities are disinclined to prosecute the American.[42] In this

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[39]Reid v. Covert, 351 U.S. 487 (1956).

[40]Civilian component is defined as civilian personnel accompanying a force ... who are in the employ of an armed service ... and not a national nor ordinarily resident in the State in which the force is located. NATO SOFA, supra note 6, Article I, paragraph 1(b).

[41]G.I.A. Draper, Civilians and the NATO Status of Forces Agreement (1966) at 52.

[42]Ehrenhaft, Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap?, 36 Geo. Wash. L. Rev. 273, 274 (1967).

situation, U.S. law is unable to reach the civilian and he is essentially free from judicial prosecution. This could not be the result the drafters of the SOFA intended.

Dependents of military are in a worse situation than the civilian component.[43] Although dependants are basically involuntary travellers having little choice in deciding where they live,[44] they are not present to perform official duties and are thus excluded from the primary jurisdiction provision.[45] It would appear that when the sending state did not have exclusive jurisdiction it was the intent to place dependents under the exclusive jurisdiction of the receiving state but, Reid places all offenses of dependents under the exclusive jurisdiction of the receiving state.[46]

Since Article VI fails to place civilians and dependents under U.S. jurisdiction, the waiver provision in paragraph 3(a) also does not apply to civilians and dependants.[47] The practice regarding dependents however has been to treat them as falling within paragraph 3 for waiver purposes. This is an ad hoc decision that allows the military authorities to deal with dependent offenses on an administrative level.[48] Also, the receiving state may decline to exercise jurisdiction thus making both the civilian and dependent amenable to U.S. administrative action.[49]

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[43]Dependants are defined as "the spouse of a member of a force or of a civilian component, or a child of such member depending on him or her for support." NATO SOFA, supra note 6, Article I, paragraph 1(c).

[44]Id. at 275.

[45]Draper, supra note 41, at 54.

[46]Snee & Pye, supra note 31, at 35.

[47]Romero, supra note 23, at 5,

[48]Draper, supra note 41, at 59.

[49]Romero, supra note 23, at 6.

(2) **Problems with Waiver:** As discussed in the preceding section, the language of the SOFA does not lend the application of waiver to civilians and dependents. There are other problems inherent in this provision which involve basic constitutional rights. Does the ability of the United States to waive jurisdiction over a U.S. national under the SOFA deny the national constitutional rights?

The U.S., when it waives its right to assert primary jurisdiction over its own national, removes the right of the national to be tried in a United States court with full constitutional protection and replaces it with the limited safeguards provided in SOFA Article VII, paragraph 9. This was precisely the claim advanced in the Girard case.[50] The United States Supreme Court upheld the constitutionality of the waiver of jurisdiction over Girard based on the fact that United States jurisdiction was predicated on a surrender of territorial jurisdiction by the foreign sovereign. The United States did not waive jurisdiction but only the primary right to exercise that jurisdiction. "When a person has violated the criminal statutes of two different sovereigns, it is for the interested sovereigns and not the criminal to settle which shall be the first to inflict punishment."[51] This view is countered by the argument that constitutional privileges cannot be "bargained away in a treaty" and was a hotly debated issue during the Senate debates over ratification of the NATO SOFA. Also, in the same year that the Supreme Court decided the Girard case, it held in Reid that treaties and laws enacted by the United States must be in compliance with the United States

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[50]Wilson v. Girard, supra note 4.

[51]Snee & Pye, supra note 31, at 62 quoting United States ex rel. Demarois v. Farrell, 87 F.2d 957,962 (8th Cir. 1937).

Constitution.[52] It is conceivable this ability to waive jurisdiction over a U.S. citizen violates rights guaranteed by the United States Constitution.

A separate problem inherent in the waiver provision is the question of whether a waiver constitutes an agreement not to prosecute. Prosecution by the waiving state is not barred when the state that obtained the waiver decides not to prosecute.[53] This causes difficulties because it erases any certainty for the accused as to whether he will be tried at all. Conceivably, if the United States obtains a waiver and subsequently declines to prosecute for lack of evidence, the accused would still be subject to trial by the foreign court. Justice is not served unless the waiver decision is determined with finality. It must decide where jurisdiction is to be exercised and preclude jurisdiction by any other state.[54]

A third problem of waiver and the United States policy to maximize waivers is that the waiver may not be in the best interest of the accused. More precisely the punishment in one state may be more favorable to the accused than the punishment in the other state.[55] The decision to request a waiver is based not on the possible outcome or level of punishment but on due process notions and can lead to abuse of the provision depending on whether the state is seeking a more lenient or harsh punishment.

(3) **Double Jeopardy**: If two states have jurisdiction, both to prescribe and to adjudicate an offense, international law does not preclude both states from prosecuting the

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[52]Beesley, supra note 3, at 203.

[53]Note, supra note 10, at 1062.

[54]Rouse, supra note 20, at 49.

[55]Davis, supra note 16, at 6.

individual.[56] In order to avoid this situation and in the spirit of cooperation, the drafters of the NATO SOFA included Article VII, paragraph 8. This provision precludes an accused from being tried for the same offense by another state once he has been tried in accordance with Article VII. Although this provision on its face seems adequate, it has several shortcomings.

Paragraph 8 specifies that it applies between "contracting parties." In the case of the United States, the contracting party is considered to be the United States military. Since civilians and dependents are not subject to U.S. military law, they are also denied the protection of this provision. A second shortfall of the provision is it only forbids a second trial in the *same territory*. Thus, if the national is tried for a violation in a court of the receiving state, they could also be tried in a U.S. court for the same violation.[57] This situation arose in United States v. Green[58] where A1C Green was tried and convicted of drug misuse by a British Criminal Court and was subsequently tried and convicted by a United States court-martial of using, possessing, and transferring heroin. The Court of Military Appeals held that Article VII, section 8 did not preclude the court-martial conviction. The court also stated that the "restriction placed on the duality of prosecutions by paragraph 8 is more illusory than real."[59]

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[56] Beesley, supra note 3 at 210.

[57] Draper, supra note 41, at 63.

[58] United States v. Green, 14 M.J 461 (1983).

[59] Id. at 463.

The double jeopardy provision is also unclear as to what type of action will bar a second prosecution. On its face the section indicates that only a trial will bar subsequent prosecution.[60] A major difficulty is that the U.S. military often imposes what is termed non-judicial punishment under Article 15 of the UCMJ without a court-martial proceeding. It would seem that this type of action or a decision by the commander not to proceed against the accused would not bar a subsequent proceeding by the foreign state. Some countries however, accept an Article 15 action as sufficient to preclude a subsequent trial. It has been the position of United States military authorities that a decision not to prosecute, made after investigation, is an exercise of judicial authority and should bar a subsequent prosecution if made after sufficient investigation.[61]

The provision for double jeopardy in the NATO SOFA is at best a weak attempt laden with conditions that basically negate any protection that it might possibly provide for the accused U.S. national.

(4) **Procedural Guarantees:** The safeguards provided to the accused under the NATO SOFA are not inclusive of all rights under the U.S. Constitution, but they are considerably more than the accused would receive without an agreement. Since all involved parties realized the United States would be the primary sending state, the rights contained in the SOFA were intended to be defined according to U.S. practice at the time.[62] In actual practice however, the rights provided by the SOFA are not exactly what Americans would

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[60]Davis, supra note 16, at 4.

[61]Draper, supra note 41, at 66.

[62]Beesley, supra note 3, at 211.

ordinarily conceive them to be. This is primarily due to the fact that most countries where U.S. forces are stationed operate under a civil law system. However, although many provisions of the Article VII fail to encompass the civilian and dependant populations, the procedural provisions contained in paragraph 9 apply to these individuals since application is not predicated on being subject to military authority.[63]

A crucial right in the U.S. system is the right to counsel. The SOFA provides for counsel, but only as the right exists under local law. The local law may not provide counsel, may limit counsel's role, or may place requirements on counsel substantially different from those commonly recognized in the United States. For example, Continental lawyers are not bound to follow the wishes of the client and are even allowed to plead guilty for the client despite the client's wishes to the contrary.[64] Congress attempted to solve the problem by passing Public Law 777 but was thwarted by the Reid holding. Therefore, since civilians and dependents are not subject to military law, they are denied the assurance of counsel provided by this law.

An additional question inherent in the right to counsel provision is when it is triggered. In the United States, a request for counsel prohibits the police from asking the accused any further questions without the presence of counsel.[65] This is a privilege U.S. citizens may take for granted that may not exist under foreign law and can lead to confusion on the part of the accused. He may assert his right to counsel to foreign investigators and

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[63]Draper, supra note 41, at 39.

[64]Rouse, supra note 19, at 58.

[65]Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981).

assume that he has made his request clear. But, if he does not assert the right to United States investigators, he is assumed to have waived that right. It makes no difference if the United States investigators are aware of a previous assertion of the right to foreign investigators. This problem leads to the admission of statements by the accused to foreign officials in U.S. criminal cases that would normally be inadmissible if made to a U.S. official.[66]

A second essential guarantee to criminal defendants under U.S. constitutional law is the right to confront adverse witnesses. Article VII of the SOFA contains a similar guarantee, but the meaning of this phrase is often misunderstood and it may not even be available due to the civil law system in many countries. In U.S. terminology, this right means the right to cross-examine witnesses. Since the civil law proceeding is not adversary, there is no right to cross-examination as the judge conducts the investigation and the report is most often presented in writing rather than in person.[67] The right to confrontation may include the right of the accused to be present when a witness gives his statement. Also in civil law practice, trials may be conducted in absentia. These are most often held for minor violations and no U.S. personnel have been imprisoned as a consequence of this type of trial. However, unless the accused waives his confrontation right, the practice of trial in absentia is a violation of the confrontation clause contained in the NATO SOFA.[68]

more to this right

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[66]United States v. Coleman, 26 M.J. 451 (1988). U.S. army specialist was investigated by German officials and asserted right to counsel. When questioned by U.S. officials, accused did not request counsel when properly advised of his rights. Statements made to German officials were admissible at trial of the accused. See also United States v. Vidal, 23 M.J. 319 (1987).

[67]Rouse, supra note 20, at 56.

[68]Snee & Pye, supra note 31, at 109.

As with many of the other provisions in the SOFA, the trial observer privilege set forth in the Senate Resolution is inapplicable to civilians and dependents since it is predicated on the person being subject to military jurisdiction. Thus there is no requirement placed on the United States, but in practice, the U.S. will almost always ensure that an observer is present to protect the rights of the U.S. citizen.[69] The individual is also entitled to have a Government representative at the trial according to SOFA Article VII, paragraph 9(g). Most countries require public trials so there is no difficulty with the observer attending the trial. Most countries will also allow the observer to attend even where the trial is closed to the public. The major difficulty occurs where the country excludes the observer from pre-trial investigation and preliminary hearings. The United States has claimed that this violates the "spirit of the agreement," but it does not seem that inclusion of the trial observer in the pre-trial activities was envisioned in the drafting of the agreement.[70]

In the United States a "speedy trial" means basically a trial without undue delay. However, civil law countries are notorious for slow trials.[71] Does this characteristic of civil law systems violate the Article VII provision for a speedy trial? Also, if the trial occurs in the United States, does the time period necessary for negotiation of jurisdiction count against the government in regards to the speedy trial time limit? These difficulties have not frequently arisen due to cooperation between the United States and the receiving state. This may seem like a small issue, but it is indicative of the fact that the safeguard provisions in

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[69]Draper, supra note 41, at 67.

[70]Snee & Pye, supra note 31, at 114-116.

[71]Rouse, supra note 20, at 52.

the SOFA are not what the United States citizen would commonly understand them to be.

Finally, although provisions regarding illegal search and seizure are considered vital in the context of United States criminal law, there is no such provision in the SOFA. Even if the United States obtains jurisdiction, the receiving state is not precluded from conducting an investigation.[72] The Military Court of Appeals has held that since the NATO SOFA does not include protection from illegal search and seizure, the individual does not have a right to object to evidence obtained by foreign officials that is not in violation of local law.[73] Evidence obtained by foreign officials that would normally be inadmissible if obtained by U.S. officials can be admitted against a U.S. citizen in a U.S. trial. Also, evidence obtained in violation of the 4th amendment by U.S. officials may be turned over for use in the prosecution of a U.S. citizen in a foreign court.[74]

(5) ***Enforcement of Guarantees:*** A major shortfall of the guarantees set forth in the SOFA is that there is no internal enforcement mechanism. Article XVI states that negotiation is the appropriate tool for enforcing the standards contained within the agreement.[75]

There is also some debate as to whether the SOFA creates an enforceable individual right under international law. The conflict focuses on whether the SOFA preserves or

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[72]Kraatz, The NATO Status of Forces Agreement and the Supplementary Agreement, Arm. Law 3 (Nov 1990).

[73]United States v. Whiting, 12 M.J. 253, (1982). Evidence obtained by German officials was admitted into evidence at the trial of Sgt Whiting, USAF. Defense counsel objected but the court held that the NATO SOFA does "not confer upon the accused any right to object to the admission of evidence because it was obtained by unreasonable search and seizure" nor does it confer any right regarding searches that would not normally exist under local law.

[74]Note, supra note 10, at 1065.

[75]Draper, supra note 41, at 67.

creates individual rights. A 1966 Court of Military Appeals case held that the SOFA does not create any individual rights but only preserves those in existence.[76] A leading authority on the SOFA states that the individual may not enforce the rights enumerated in paragraph 9 against the receiving state.[77] However, two fairly recent decisions by the Court of Military Appeals indicate the opposite conclusion holding both the double jeopardy provision in Article VII, paragraph 8 and the procedural guarantees of Article VII, paragraph 9 are personal in nature and thus the accused has standing to assert a violation of the treaty.[78] Since paragraph 9 applies to military, civilians, and dependents, this right to enforce the guarantees would apply to all three categories of individuals.

Another possible avenue for the accused would be the European Human Rights Convention.[79] Although the United States is not a party to this treaty, many of the countries where U.S. forces are stationed have signed this treaty and are bound to abide by its terms. This treaty indicates the creation of individual rights and enumerates the same basic principles as Article VII of the SOFA.[80]

D. Summary

The NATO Status of Forces Agreement does not contain every right the U.S. national is guaranteed under the U.S. Constitution. and those rights that it does contain are not as comprehensive as a U.S. national would expect. However, the SOFA in general has been

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[76]United States v. Carter, 16 C.M.A. 277, 36 C.M.R. 433 (1966).; See also Beesley, supra note 3 at 211.

[77]Draper, supra note 41, at 66.

[78]United States v. Whiting, supra note 73, at 254.; United States v. Green, supra note 58, at 464.

[79]European Human Rights Conventions, supra note 25.

[80]Id. Articles 5, 6, and 7.

quite effective within its scope. It is a complicated agreement attempting to resolve many complex problems involved in international criminal jurisdiction and prosecution that succeeds in providing U.S. nationals in its purview with rights they would not have under traditional international law.

IV. TRADITIONAL INTERNATIONAL LAW: U.S. NATIONALS IN FOREIGN COURTS

What happens to a U.S. national accused of a crime in a foreign country who does not fall under an exception, like the Status of Forces Agreements? Since obtaining jurisdiction is still the primary method of ensuring constitutional guarantees to the U.S. national, can the U.S. obtain jurisdiction over criminal acts committed by its nationals in foreign countries? When the national is subject to the jurisdiction of the foreign court are there any United States policies or treaties that would lend some constitutional protection to the individual? Are there rules of international law which the U.S. could enforce to ensure the national a fair trial? The Status of Forces Agreements exist as a solution to the jurisdictional dilemma under certain circumstances. Under the SOFA, the foreign state consents to U.S. enforcement of U.S. laws within the foreign territory. But, the everyday U.S. citizen does not have the benefit such an agreement. The following sections address avenues of obtaining jurisdiction over U.S. nationals in foreign countries, possible methods of ensuring the individual some constitutional protection in a foreign court, remedies for violations of individual rights, and the need to address the lack of attention given to these concerns.

A. Basis of Criminal Jurisdiction Over Civilians

A U.S. national who travels abroad must respect the laws of a foreign state. When the national commits a crime in the foreign state the question of who may prosecute the national is raised. If the criminal act violates only the law of one state, there is no conflict; Jurisdiction over the offense is exclusive. However, when the act violates the law of both states, for example when the national commits an act such as a homicide, there is no fixed rule as to which state wins the jurisdictional battle.[81] This is the general international law concept, but the United States has placed domestic limitations on the application of U.S. law outside U.S. territory. Considering that the purpose of criminal law is to maintain order within the territory, U.S. criminal law is presumed to require the locus of the crime occur within the territorial United States. This is especially true with crimes against individuals or individual property. Accordingly, Congress must clearly express their intent to override this territorial limitation.[82]

When such intent exists, and the act violates the law of both states, there is a concurrent jurisdiction dilemma. Since the general rule is that a state may not enforce its law in the territory of another state, the state with physical custody of the defendant exercises jurisdiction.[83] Thus a U.S. national in a foreign country is very susceptible to foreign jurisdiction. The only way for the United States to obtain jurisdiction is if the act violates a

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[81]Renner, supra note 28.

[82]Regarding the presumption of domestic scope of criminal statutes see United States v. Bowman, 260 U.S. 94, 43 S.Ct. 39 (1922) stating "Crimes against private individuals or their property must be committed within the territorial jurisdiction of the government...failure of Congress to provide that punishment is to extend to such offenses committed outside [this] jurisdiction negatives the purpose of Congress in this regard."

[83]Romero, supra note 23.

criminal statute which clearly expresses intent for the punishment to extend to crimes committed outside the territorial United States.

The Restatement (Revised) offers a limited solution to the concurrent jurisdiction problem. It imposes a requirement of reasonableness on the exercise of jurisdiction both to prescribe law and to adjudicate over a criminal offense.[84] Section 421 presumes the exercise of jurisdiction reasonable if the defendant is a national of the state (nationality jurisdiction), if the defendant is in the territory of the state, or if the act occurred within the state (territorial jurisdiction). Section 403 also states that when two states have reasonable basis for jurisdiction, the state with the lesser interest is to defer to the state whose interest is greater.[85] Thus the Restatement provides no substantive guidance as to the resolution of a jurisdictional conflict.

Thus we see, the emphasis in criminal law of protecting the public within the territory order against criminal acts leads to the general theory that if the national commits a criminal act within a foreign country and is in the foreign country at the time of indictment, that national is subject to the jurisdiction of the foreign court.[86] Considering these jurisdictional issues, the question evolves into one of protection and remedy. When a U.S. national is present in a foreign country and is accused of a crime, can the U.S. gain jurisdiction and if not, what can be done to protect the national in the foreign legal system?

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[84]Restatement of the Foreign Relations Law of the United States (Revised) (1968), sec. 402, 403.

[85]Id.

[86]United States v. Bowman, supra note 82, at 98.

B. Extradition and Jurisdiction over U.S. Nationals

If the U.S. national is present within the United States, U.S. courts may exercise jurisdiction over the national even though the offense was committed in a foreign country. However, the offense must be a violation of a U.S. law which was intended to punish violations occurring outside of the territorial United States.[87] When the national is present in the foreign country where the act occurred, gaining jurisdiction to adjudicate the offense becomes more difficult. Is extradition a viable means of obtaining jurisdiction over U.S. nationals accused of crimes in foreign countries, thus ensuring them all U.S. constitutional guarantees?

Extradition is generally the surrender of an individual accused of a crime by the state in which the accused is found to the state in which the accused is alleged to have committed the crime.[88] This concept is most often used when an individual commits a crime in one state and flees to another to escape prosecution. The state in which the crime was committed may request the other state to surrender the person for prosecution.[89] In the context in which this paper considers extradition, the facts are slightly different. Here the U.S. national has committed an offense in a foreign country, is found in the foreign country, and the U.S. seeks to have the individual extradited to the United States for trial. Another scenario occurs where the individual was accused of a crime in a foreign country, fled back to the United States, and the foreign country seeks to extradite the individual for prosecution. In both

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[87]Restatement (Revised) supra note 84, sec. 431.

[88]Henkin, Pugh, Schachter, and Smith, International Law: Cases and Materials (2d ed. 1987) at 885.

[89]Beesley, supra note 3, at 215.

these cases, the United States may be able to ensure some rights for the accused through extradition.

Extradition is extremely complex and the details are out of the scope of this paper. Hence this discussion represents only the most simplified explanation. It is first important to note there is no international law granting the right of extradition. Neither a duty to extradite nor a right to demand extradition exists in the absence of a treaty.[90] Therefore, the right of the United States to request extradition depends on the existence of a treaty and its specific terms. Traditional extradition treaties allow an extradition request only when the offense occurred in the requesting state's territory.[91] This would preclude the United States from obtaining jurisdiction to adjudicate offenses committed by U.S. nationals in a foreign country. However, modern treaties[92] permit an extradition request when the offense was committed outside the requesting state's territory if the accused is a national of the requesting state or the requesting state's laws provide punishment for the offense if committed under similar circumstances.[93] These treaties would allow the United States to request extradition of the national and try him in a U.S. court with full constitutional guarantees. Although most extradition treaties specifically list the extraditable crimes, the list is not exclusive. They generally allow extradition for crimes meeting a certain level of punishment in each country. Thus, depending on the specific treaty provisions involved, the United States may

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[90]Id. at 216 quoting Factor v. Laubenheimer, 290 U.S. 276 (1933).

[91]An example of such a treaty is the extradition treaty with the United Kingdom. Extradition Treaty, Oct. 21, 1976, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468.

[92]See Extradition Treaty, May 4, 1978, United States-Mexico, 31 U.S.T. 5059, T.I.A.S. No. 9656.

[93]Nanda & Bassiouni, International Criminal Law: A Guide to U.S. Practice and Procedure (1987) at 336.

be able to extradite a U.S. national from a foreign country and ensure the individual's constitutional rights in a U.S. court.

When a foreign country requests U.S. extradition of a U.S. national who has committed an offense in the foreign country, what can the U.S. do protect the national? Again, it is a question of treaty interpretation, but most treaties require the states adhere to certain procedures prior to extradition.[94] In this manner, the U.S. can ensure the foreign country has a valid claim against the national. The requesting country must include in their request a statement of the facts, applicable law, maximum punishment for the offense, and a certified copy of the warrant request.[95] An extradition magistrate examines the evidence to determine if there is probable cause to believe the accused committed an extraditable offense named in the treaty and whether extradition is proper.[96] This procedure protects the U.S. national from a foreign trial where the evidence is insufficient.

Extradition treaties do not take the place of a requirement to provide procedural safeguards in the U.S. national's trial abroad, but they do provide a limited means of ensuring some protection. As these agreements develop, they are beginning to allow states more flexibility in extradition decisions. An example are the humanitarian provisions which enable a requested state to refuse extradition if it would be incompatible with the individual's health or age.[97] Although many treaties do not require a state to extradite its own nationals,

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[94]Beesley, supra note 3 at 221.

[95]U.S.-Mexico Treaty, supra note 92, Article 10.; U.S.-United Kingdom Treaty, supra note 91, Article VII.

[96]Beesley, supra note 3 at 223.

[97]Nanda, supra note 93, at 338.

it has been U.S. policy to do so in return for reciprocity from other states.[98]

Extradition treaties are most commonly used to extradite foreign nationals who have been accused of criminal acts within the U.S. But, extradition could also be used as an effective tool to protect U.S. nationals from abuse by foreign judicial systems.

C. Protection of the U.S. National in the Foreign Court and Available Remedies

Once it is determined that the U.S. national will be tried by a foreign judicial system, are there methods the United States may utilize to ensure a fair trial? The preliminary concern is that the state abide by its own laws in conducting a criminal trial. Unfortunately, since the state is sovereign and the United States cannot force the state to do anything but abide by its own laws and any applicable international law, either customary or treaty law, most efforts by the United States are after the fact.

An example of ensuring application of local law is seen in the case of Harry Roberts, a U.S. national accused of assault upon a house in Mexico. Mr. Roberts was detained an unusually long period of time prior to trial, in violation of the Mexican Constitution. The U.S. first tried diplomatic efforts to expedite the trial, but after repeated failures brought an international claim on behalf of Mr. Roberts.[99] This example illustrates the use of diplomatic channels as the first avenue of approach when a U.S. national is being treated unfairly by a foreign judicial system. If diplomatic channels fail to correct the problem, the next step is to bring an international claim on behalf of the national for the foreign country's

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[98]Beesley, supra note 3 at 218.

[99]Dunn, The Protection of Nationals: A Study in the Application of International Law (1932).

failure to abide by its own laws.[100]

The foreign state must also abide by international law. The United Nations ratified the Universal Declarations of Human Rights and many states have signed regional human rights conventions. Three examples of these conventions are the European Human Rights Convention[101], The American Declaration on the Rights and Duties of Man[102] (to which the United States is a party), and the African Charter on Human and Peoples' Rights[103]. All three conventions contain the right to liberty and security as well as a provision which is the equivalent of a guarantee to a fair trial. What constitutes a fair trial may differ from state to state, but the European Convention specifically lists basic guarantees such as those contained in the Status of Forces Agreements. There seems to be a general consensus that these are basic rights that all should be entitled to in a criminal proceeding such that these treaties may be considered a codification of existing state practice and thereby constitute customary international law.[104] If the U.S. national was not afforded a fair trial in the foreign state, the United States could bring an international claim on behalf of the national under applicable international law.

A separate option available for the individual is to seek remedy in the local courts of the foreign country. If there has been a violation of a local constitution or of a treaty which the state is a signatory to, this may be a viable option for the national.

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[100]Id. at 17.

[101]European Human Rights Convention, supra note 25.

[102]American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36.

[103]African Charter on Human and Peoples' Rights, reprinted in 21 Int's Legal Materials 51 (1982).

[104]Nanda, supra note 93, at 508.

D. Summary

Because of the random nature of U.S. nationals' visits to foreign countries and the right of a state to prescribe the law within its territories, there has been little attempt to guarantee constitutional safeguards to these nationals when they find themselves subject to criminal prosecution in a foreign court. Extradition treaties may provide a viable solution, but the limited application of U.S. criminal statutes outside the territorial United States makes the range of crimes open to this option very narrow. As the extradition treaties progress and begin to allow extradition in a larger number of circumstances, they may provide a broader solution. The fact remains that there is little the United States can do to ensure a U.S. national is treated fairly in a foreign court. Apart from diplomatic requests the only available remedies exist after the harm has already been inflicted.

IV. CONCLUSIONS

It is obvious that there is a vast discrepancy between the treatment of military members, members of the civilian component, and dependants under the NATO SOFA and the everyday U.S. national abroad. The SOFA provides the United States jurisdiction over the military member in many instances and, although the jurisdictional provisions do not apply to civilians and dependants accompanying military forces abroad, the procedural safeguards in Article VII are guaranteed to all three categories of individuals. In contrast, the everyday citizen is directly subject to the foreign state's laws with the only remedies existing after the fact.

There is a clear need for international legislation dealing with concurrent jurisdiction problems and codifying the basic rights an individual is entitled to when tried for a criminal

offense. The Status of Forces Agreements were negotiated to allow the exchange of military forces for cooperation in mutual defense. As the barriers within the global community deteriorate and the rights of the individual are recognized on the international plane, there is a need for the same type of cooperation between countries as a whole, not just in regard to their military forces.

The NATO SOFA's effectiveness suggests that its concepts might be useful outside the sphere of its specific application and provide a model for codification of international law regarding concurrent jurisdiction and individual rights. One expert has even termed the NATO SOFA the "precursor to an international bill of procedural rights."[105] Looking at the current and future world situation, some type of international law is needed to fill the gaps and ensure fair treatment for all individuals within the criminal law system. Considering that the human rights conventions currently in force already grant an accused limited fundamental rights in a criminal trial, the creation of an international bill of rights which all countries must abide by may not be as far out of reach as one might think.

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[105]Ellert, NATO Fair Trial Safeguards: Precursor to an International Bill of Procedural Rights (1963).